



1 oral argument.

2  
3 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**  
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5 Plaintiff filed an application for a period of disability and DIB  
6 on December 10, 2002. (Administrative Record ("A.R.") 48-50.)  
7 Plaintiff claims to have been disabled since December 15, 2001, due to  
8 thoracic outlet compression syndrome, impingement syndrome, and possible  
9 carpal tunnel syndrome.<sup>1</sup> (A.R. 13-14, 53.) Plaintiff has past relevant  
10 work experience as a licensed vocational nurse, certified nursing  
11 assistant, and cashier/hostess.<sup>2</sup> (A.R. 54, 848.)  
12

13 After the Commissioner denied plaintiff's claims initially and upon  
14 reconsideration, plaintiff requested a hearing. (A.R. 37-40, 43-47.)  
15 On April 21, 2004, plaintiff, who was represented by counsel, appeared  
16 and testified at a hearing before Administrative Law Judge Sally Reason  
17 ("ALJ Reason"). (A.R. 431-59.) On July 15, 2004, ALJ Reason denied  
18 plaintiff's claims (A.R. 13-20), and the Appeals Council subsequently  
19 denied plaintiff's request for review of ALJ Reason's decision (A.R. 5-  
20 9). On October 14, 2005, plaintiff sought review in this Court, which  
21 remanded the case for further proceedings in a March 26, 2007 Order  
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25 <sup>1</sup> Plaintiff amended her onset date from November 20, 2001, to  
26 December 15, 2001, to comport with her work history. (A.R. 13, 48,  
440.)

27 <sup>2</sup> Plaintiff testified that she had a "combination job" --  
28 working both as a cashier and a hostess at the Burbank Airport. (A.R.  
848.)

1 ("Remand Order").<sup>3</sup> (A.R. 605-34.)

2  
3 On July 13, 2007, the Appeals Council effectuated the Court's  
4 Remand Order and remanded the matter to an administrative law judge for  
5 a supplemental hearing, which occurred on October 1, 2007. (A.R. 642,  
6 844-54.) At the hearing, plaintiff again testified before ALJ Reason.  
7 Ronald Hatakeyama, a vocational expert, also testified. (A.R. 855-58.)  
8 On November 29, 2007, ALJ Reason denied plaintiff's claims. (A.R. 529-  
9 40.)

10  
11 Subsequently, the Appeals Council, in its May 28, 2008 Order,  
12 assumed jurisdiction of the case and remanded the matter for further  
13 proceedings. (A.R. 668-70.) The Appeals Council based its remand on "a  
14 discrepancy in [ALJ Reason]'s finding that [plaintiff] can return to  
15 [her] past relevant work as a hostess." (A.R. 668-70.)

16  
17 On October 8, 2008, plaintiff testified at a hearing before  
18 Administrative Law Judge Zane A. Lang (the "ALJ"). (A.R. 806-16, 827-  
19 28, 831-33.) Medical expert Michael Stuart Gurvey, M.D., and vocational  
20 expert Gregory Jones also testified. (A.R. 804-06, 816-40.) On January  
21 15, 2009, the ALJ denied plaintiff's claims. (A.R. 494-505.) That  
22 decision is now at issue in this action.

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27 <sup>3</sup> The Remand Order directed a remand for two reasons: first,  
28 the ALJ improperly rejected the opinion of plaintiff's treating  
physician, Dr. John Larsen; and second, the ALJ improperly discredited  
plaintiff's credibility. (A.R. 606-34.)

## SUMMARY OF ADMINISTRATIVE DECISION

The ALJ found that plaintiff has not engaged in substantial gainful activity since December 5, 2001, the alleged onset date of her claimed disability. (A.R. 495.) The ALJ further found that, at the time of the decision, plaintiff was a "younger individual" with a "post secondary education." (A.R. 495, 503.) The ALJ determined that plaintiff has the following severe impairments: thoracic outlet syndrome, status post resections of the ribs, bilateral shoulder impingement syndrome, and possible bilateral carpal tunnel syndrome.<sup>4</sup> (*Id.*) The ALJ also determined that plaintiff does not have an impairment or combination of impairments that meets or equals in severity any impairment listed in Appendix 1, Subpart P, Regulations No. 4. (A.R. 496.) Additionally, the ALJ found that plaintiff's allegations regarding her pain and limitations were not entirely credible. (A.R. 497-98, 501-02, 504.)

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<sup>4</sup> In determining plaintiff's "severe" impairments, the ALJ abandoned ALJ Reason's determination that plaintiff's cervical spine impairment was "severe." (A.R. 495.) This constitutes error. In the 2007 Remand Order, this Court remanded the case to ALJ Reason to remedy specified deficiencies and errors -- namely, to reconsider the opinion of plaintiff's treating physician and plaintiff's credibility. After ALJ Reason issued her decision denying plaintiff's claims, the Appeals Council remanded the matter to the present ALJ based on a discrepancy in ALJ Reason's finding that plaintiff could return to her past relevant work as a hostess. Neither the 2007 Remand Order nor the Appeals Council's Remand Order authorized the ALJ to redetermine the severity of plaintiff's impairments at step two. Accordingly, the ALJ committed legal error by deviating from the scope of the Remand Orders. See e.g., Gallagher v. Astrue, 2009 WL 57033 (C.D. Cal. Jan. 6, 2009)(although remand was limited to step four and step five issues regarding plaintiff's past relevant work and alternate work, the ALJ committed legal error when he made a redetermination of the plaintiff's severe impairments at step two, reassessed the plaintiff's RFC at step four, and eliminated moderate limitations previously found); see also Ischay v. Barnhart, 383 F. Supp. 2d 1199, 1214 (C.D. Cal. 2005)("The rule of mandate requires that, on remand, the lower court's actions must be consistent with both the letter and the spirit of the higher court's decision.").

1       The ALJ determined that plaintiff has the residual functional  
2 capacity ("RFC") for:

3  
4       work with limitations to lifting/carrying below shoulder level  
5       only 10 pounds occasionally and less than 10 pounds  
6       frequently; no weights above shoulder level or overhead  
7       bilaterally, and that pushing and pulling are limited to the  
8       below shoulder level capacities. Additionally, [plaintiff] is  
9       limited to occasionally reaching, handling and fingering in  
10      all directions (no repetitive fingering such as keyboarding  
11      for more than 30 minutes at a time without a 5 minute break);  
12      occasionally crawling; no climbing of ladders, ropes or  
13      scaffolds; and no work that involves heavy vibrations, such as  
14      with jackhammers.

15  
16 (A.R. 496.)

17  
18       The ALJ concluded that plaintiff was unable to perform her past  
19 relevant work. (A.R. 503.) However, having considered plaintiff's age,  
20 education, work experience, and medical limitations, as well as the  
21 testimony of the vocational expert, the ALJ found that jobs exist in the  
22 national economy that plaintiff could perform, including those of a call  
23 out operator and a surveillance system monitor. (A.R. 503-04.)  
24 Accordingly, the ALJ concluded that plaintiff was not disabled within  
25 the meaning of the Social Security Act through the date of his decision.  
26 (A.R. 505.)

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## STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine whether it is free from legal error and supported by substantial evidence in the record as a whole. Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citation omitted). The "evidence must be more than a mere scintilla but not necessarily a preponderance." Connett v. Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the record can constitute substantial evidence, only those 'reasonably drawn from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006)(citation omitted).

Although this Court cannot substitute its discretion for that of the Commissioner, the Court nonetheless must review the record as a whole, "weighing both the evidence that supports and the evidence that detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995).

The Court will uphold the Commissioner's decision when the evidence is susceptible to more than one rational interpretation. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may review only the reasons stated by the ALJ in his decision "and may not

1 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
 2 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
 3 the Commissioner's decision if it is based on harmless error, which  
 4 exists only when it is "clear from the record that an ALJ's error was  
 5 'inconsequential to the ultimate nondisability determination.'" Robbins  
 6 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
 7 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d  
 8 at 679.

## 10 DISCUSSION

11  
 12 Plaintiff makes the following four claims: (1) the ALJ failed to  
 13 give appropriate weight to the opinion of plaintiff's treating doctor  
 14 and the diagnosis of plaintiff's chiropractor; (2) the ALJ improperly  
 15 evaluated plaintiff's credibility; (3) the ALJ improperly assessed  
 16 plaintiff's RFC; and (4) the ALJ improperly found that plaintiff can  
 17 perform work other than her past relevant work.<sup>5</sup> (Joint Stipulation  
 18 ("Joint Stip.") at 3.)

### 20 I. The ALJ's Failure To Discuss The Post-Hearing Evidence Constitutes 21 Error.

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 23 "The SSA's regulations and directives allow for a claimant to  
 24 submit additional evidence after an administrative hearing but before  
 25 the ALJ renders [his] decision." Lord v. Apfel, 114 F. Supp. 2d 3, 14

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26  
 27 <sup>5</sup> Plaintiff subsumes the issue regarding the submission of  
 28 additional evidence -- plaintiff's 2008 MRI and CT reports -- within her  
 first claim. For purposes of clarity, however, the Court will address  
 this issue separately.

1 (D.N.H. 2000)(*citing* 20 C.F.R. §§ 404.936(a), 404.944 (1999); HALLEX I-  
2 2-630, 1993 WL 643026 (June 30, 1994); HALLEX I-2-678, 1993 WL 751904  
3 (June 30, 1994)); *see also* Bates v. Sullivan, 894 F.2d 1059, 1064 (9th  
4 Cir. 1990)(noting that the Appeals Council shall consider the entire  
5 record, including new and material evidence submitted to it, if the  
6 additional evidence relates to the period on or before the date of the  
7 ALJ's decision); 20 C.F.R. § 404.970(b).

8  
9 In this case, the ALJ failed to discuss plaintiff's updated MRI and  
10 CT reports, which were submitted to the ALJ prior to his January 15,  
11 2009 decision. Plaintiff submitted the additional evidence to the ALJ  
12 on November 29, 2008 -- approximately seven weeks after the October 8,  
13 2008 hearing and six weeks *before* the ALJ's January 15, 2009 decision.  
14 (A.R. 485, 494-505, 800.) The evidence consisted of a CT report<sup>6</sup> dated  
15 November 12, 2008, and MRI reports dated July 18, 2008, and July 12,  
16 2002.<sup>7</sup> (A.R. 484-89.) In pertinent part, the additional evidence  
17 appears to show that plaintiff's cervical spine condition has worsened  
18 since 2002, particularly at the C5-6 location.<sup>8</sup> (A.R. 486-89.)

19  
20 <sup>6</sup> When plaintiff submitted the additional evidence to the ALJ,  
21 she referred to the November 10, 2008 report as an "MRI report." (A.R.  
22 484-85.) Upon closer examination, however, the report appears to be a  
CT report. (A.R. 486.)

23 <sup>7</sup> The additional evidence also consisted of a note from  
24 plaintiff dated November 26, 2008, indicating that she was scheduled to  
have an anterior cervical microdiscectomy with fusion and instrumentation  
surgery on December 12, 2008. (A.R. 489.)

25 <sup>8</sup> The findings of plaintiff's November 10, 2008 CT scan were as  
26 follows:

27 Mild reversal of the cervical lordosis is present and is  
28 associated with minimal anterolisthesis at C4-5. Irregular 3  
mm nodular density is present in the apex of the right upper  
lobe (series 200, image 16).



1 Although the ALJ addresses the 2002 MRI report in his decision, he  
2 does not address the 2008 CT and MRI reports. Accordingly, it is  
3 impossible for the Court to determine whether the ALJ rejected or simply  
4 ignored that evidence. See Lord, 114 F. Supp. 2d at 14. While the ALJ  
5 was entitled to find the additional evidence "unworthy of credit," he  
6 was not entitled to find it "unworthy of comment." *Id.* at 15-16. The

7  
8 C2-C3: Normal.

9 C3-C4: Right paracentral disc protrusion measures 1-2 mm  
10 results in mild central spinal stenosis and mild flattening of  
11 the right ventral portion of the cord. No neural foraminal  
12 narrowing is present.

13 C4-C5: Mild decreased disc height is present. Diffuse disc  
14 protrusion and asymmetric to the right which measures 1-2 mm  
15 AP which results in mild central spinal stenosis and mild mass  
16 effect on the right ventral portion of the cord. No neural  
17 foraminal narrowing is present.

18 C5-C6: Mild to moderate decreased disc height is asymmetric  
19 to the right. Focal right paracentral disc protrusion  
20 measures 3 x 11 mm (AP by wide) which compresses the right  
21 ventral portion of the cord and likely affects the exiting  
22 right C6 nerve root (series 3, image 52-53). Moderate right  
23 neural foraminal narrowing is present. Left neural foramen is  
24 widely patent.

25 C6-C7 to T2-T3: Normal.

26 (A.R. 486.)

27 The impression of the CT scan was as follows:

28 1. Focal right paracentral disc protrusion at C5-C6 measuring  
3 x 11 mm (AP by wide) which compresses the right ventral  
portion of the cord and likely impinges the exiting right C6  
nerve root.

2. Mild reversal of the cervical lordosis with minimal  
anterolisthesis at C4-C5.

3. Nonspecific irregular 3 mm nodular density in the apex of  
the right upper lobe which could be related to an area of  
scarring or a nodule. Followup CT of the chest is recommended  
in 12 months to document stability.

(A.R. 486-87.)

1 ALJ's failure to discuss the additional evidence, therefore, constitutes  
2 error.

3  
4 **II. The ALJ Failed To Give Appropriate Weight To The Opinions And**  
5 **Diagnoses Of Plaintiff's Treating Physician And Chiropractor.**  
6

7 Plaintiff contends that the ALJ failed to give appropriate weight  
8 to the opinion of her treating orthopedist, John Larsen, M.D., and the  
9 diagnosis of her chiropractor, Milton L. Payne, D.C. (Joint Stip. at 3-  
10 6.) Specifically, plaintiff argues that, while the ALJ provided  
11 specific reasons for rejecting Dr. Larsen's and Dr. Payne's opinions and  
12 diagnoses, those reasons were not legitimate. (Joint Stip. at 6.)  
13

14 **A. The ALJ Failed To Properly Consider The Opinion Of Dr. Larsen.**  
15

16 It is the responsibility of the ALJ to resolve conflicts in medical  
17 testimony and analyze evidence. Magallanes v. Bowen, 881 F.2d 747, 750  
18 (9th Cir. 1989). In the hierarchy of physician opinions considered in  
19 assessing a social security claim, "[g]enerally, a treating physician's  
20 opinion carries more weight than an examining physician's, and an  
21 examining physician's opinion carries more weight than a reviewing  
22 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.  
23 2001); 20 C.F.R. § 404.1527(d). The opinions of treating physicians are  
24 entitled to the greatest weight, because the treating physician is hired  
25 to cure and has a better opportunity to observe the claimant.  
26 Magallanes, 881 F.2d at 751. When a treating physician's opinion is not  
27 contradicted by another physician, it may be rejected only for "clear  
28 and convincing" reasons. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.

1 1995)(as amended). When contradicted by another doctor, a treating  
2 physician's opinion may only be rejected if the ALJ provides "specific  
3 and legitimate" reasons supported by substantial evidence in the record.  
4 *Id.*

5  
6 An ALJ "has a special duty to fully and fairly develop the record  
7 and to assure that claimant's interests are considered." Brown v.  
8 Heckler, 713 F.2d 441, 443 (9th Cir. 1983). Pursuant to 20 C.F.R. §  
9 404.1512(e), the Administration "will seek additional evidence or  
10 clarification from your medical source when the report from your  
11 medical source contains a conflict or ambiguity that must be resolved,  
12 [or] the report does not contain all the necessary information . . . ."  
13 See Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996)(noting that  
14 "[i]f the ALJ thought he needed to know the basis of [the doctor's]  
15 opinions in order to evaluate them, he had a duty to conduct an  
16 appropriate inquiry").

17  
18 Here, the ALJ erred by rejecting Dr. Larsen's opinion without  
19 stating legitimate reasons, supported by substantial evidence of record,  
20 for doing so, and without attempting to recontact Dr. Larsen. The ALJ  
21 rejected Dr. Larsen's opinion regarding plaintiff's standing, walking,  
22 and sitting limitations, as well as her need to be absent from work and  
23 her cervical spine condition, because, in the ALJ's view, Dr. Larsen's  
24 opinion was not supported by the evidence of record and there were  
25 contrary examining and other source opinions. (See A.R. 499-501.)  
26 However, in view of plaintiff's submission of additional evidence and  
27 the ALJ's failure to comment upon it, the Court does not find the ALJ's  
28 reasons to be legitimate or supported by the requisite substantial

1 evidence.

2  
3       Moreover, it appears that the contrary examining and other source  
4 opinions are based on an incomplete medical record, and thus, they  
5 cannot constitute substantial evidence. For example, at the October  
6 2008 hearing, Dr. Gurvey testified that plaintiff's central disc bulge  
7 did not show a pathology that either explains cervical spine pain or  
8 supports Dr. Larsen's "extreme" restrictions. (A.R. 499-500, 821.)  
9 Clearly, however, Dr. Gurvey did not review plaintiff's updated MRI and  
10 CT reports, which were not yet available, before rendering his opinion.  
11 Further, there is no evidence of record to suggest that the ALJ  
12 submitted the additional evidence to Dr. Gurvey following the hearing,  
13 so that, if appropriate, he could reconsider his opinion regarding  
14 plaintiff's condition and limitations. In pertinent part, the  
15 additional reports appear to show that plaintiff's central disc bulge  
16 has increased in size since her 2002 MRI report, and it is unclear what  
17 impact, if any, this additional evidence would have on Dr. Gurvey's  
18 opinion. Accordingly, the ALJ's reliance on Dr. Gurvey's opinion, and  
19 other treating and source opinions, is improper, because those opinions  
20 are not based on a complete medical record and, thus, cannot support a  
21 rejection of Dr. Larsen's opinion.

22  
23       The ALJ's other stated reasons for rejecting Dr. Larsen's opinion  
24 -- to wit, that Dr. Larsen's reports contain internal inconsistencies  
25 and that his opinion predates plaintiff's surgeries, and plaintiff's  
26 condition may have improved -- cannot, without further inquiry, support  
27 a rejection of Dr. Larsen's opinion. First, while Dr. Larsen's reports  
28 are not at complete odds with one another, his reports do contain

1 different limitations and restrictions,<sup>9</sup> particularly with respect to  
2 plaintiff's alleged sitting, walking, and standing limitations.  
3 However, to the extent that the ALJ found it "curious" that Dr. Larsen's  
4 reports contained differing limitations and restrictions, the ALJ should  
5 have recontacted Dr. Larsen in accordance with his duty to conduct an  
6 appropriate inquiry.

7  
8 Second, the ALJ's suggestion, that plaintiff's condition "may" have  
9 improved following her surgeries, is not a legitimate reason for  
10 rejecting Dr. Larsen's opinion. The medical evidence regarding  
11 plaintiff's post-surgery condition is equivocal, at best, as evidenced  
12 by the updated MRI and CT results, which appear to show that plaintiff's  
13 cervical spine condition is worsening. The uncertainty of plaintiff's  
14 condition, in view of the updated MRI and CT results, suggests a need

15  
16 <sup>9</sup> In an April 2003 Medical Source Statement, Dr. Larsen found  
17 that plaintiff could stand and/or walk less than 2 hours in an 8 hour  
18 workday, and sit for 1 to 2 hours with breaks. (A.R. 147.) He found  
19 that plaintiff would need to alternate standing and sitting "as needed."  
20 (A.R. 148.) He noted that plaintiff has limited reaching, handling,  
21 fingering, and feeling, as well as environmental restrictions involving  
heights, moving machinery, temperature extremes, chemicals, and dust.  
Curiously, and perhaps carelessly, he also checked entries indicating  
that plaintiff has seeing, hearing, and speaking limitations --  
limitations that appear to be wholly unsupported by the evidence of  
record.

22 In a February 2004 report prepared in connection with  
23 plaintiff's worker's compensation claim, Dr. Larsen did not include any  
24 sitting, standing, or walking restrictions. (A.R. 401-03.) He also  
included no sensory or environmental restrictions. (*Id.*)

25 In a March 2004 Physical Residual Functional Capacity  
26 Questionnaire, Dr. Larsen found that plaintiff could sit and/or stand  
27 for more than 2 hours continuously; could sit and stand/walk for at  
28 least 6 hours in an 8 hour working day (with normal breaks); and needs  
to walk every 90 minutes for a period of 15 minutes. (A.R. 421-22.) He  
also estimated that plaintiff is likely to be absent from work about  
twice a week as a result of her impairments or treatment. (A.R. 423.)  
No sensory or environmental restrictions were included.

1 for the ALJ to develop the record further.

2  
3 The ALJ's last reason for rejecting Dr. Larsen's opinion -- that  
4 "Dr. Larsen is not an expert in thoracic surgery - which is the primary  
5 basis for the various limitations that he assessed" -- is not  
6 legitimate. (A.R. 501.) Although Dr. Larsen is not an expert in  
7 thoracic outlet syndrome, Dr. Larsen did rely on the diagnoses of two  
8 thoracic outlet syndrome experts, Dr. Sam Ahn and Dr. Sheldon Jordan, in  
9 assessing plaintiff's limitations. In addition, as plaintiff properly  
10 notes, Dr. Gurvey, upon whom the ALJ "heavily" relies in rejecting Dr.  
11 Larsen's opinion, also is not a specialist in thoracic outlet syndrome;  
12 he is a board certified orthopedic surgeon, just like Dr. Larsen.  
13 (Joint Stip. at 5; *citing* A.R. 361, 804.) While the Ninth Circuit  
14 directs that greater weight be given to the opinion of a specialist than  
15 a generalist, Dr. Gurvey is not a specialist in thoracic outlet  
16 syndrome, and there is no opinion from a thoracic outlet syndrome  
17 specialist that contradicts Dr. Larsen's opinion. *See generally Bunnell*  
18 *v. Sullivan*, 912 F.2d 1149 (9th Cir. 1990). Accordingly, it was  
19 improper for the ALJ to reject Dr. Larsen's opinion on this ground.

20  
21 **B. The ALJ Should Revisit His Consideration Of Dr. Payne's**  
22 **Diagnosis Regarding Plaintiff's Headaches.**

23  
24 According to the Social Security Regulations, a claimant may submit  
25 information from other sources, such as chiropractors, to help the ALJ  
26 understand "the nature and severity of [the] impairment" as well as how  
27 the "impairment affects [the claimant's] ability to work." *See* 20  
28 C.F.R. § 404.1513(e). Although a chiropractor is not an "acceptable

1 medical source," the ALJ may use evidence from chiropractors when  
2 considering the severity of impairments. See 20 C.F.R. § 404.1513(d).  
3 Ultimately, the ALJ has the discretion to determine the appropriate  
4 weight to accord the opinion of a chiropractor. Diaz v. Shala, 59 F.3d  
5 307, 313-14 (9th Cir. 1995); Social Security Ruling 06-03p, 2006 SSR  
6 LEXIS 5, \*7-8.

7  
8 In the present case, the ALJ apparently gave no weight to the  
9 reports from Dr. Payne, plaintiff's chiropractor, who diagnosed  
10 plaintiff with, among other medical conditions, headaches. (A.R. 502.)  
11 While headaches may not be within the normal purview of a chiropractor,  
12 plaintiff saw Dr. Payne for approximately two years, during which time  
13 her headaches ("cephalgia") were well-documented.<sup>10</sup> To the extent the  
14 ALJ attempts to dismiss Dr. Payne's headache diagnosis, because  
15 plaintiff's headaches "receive scant mention from any other source," the  
16 ALJ errs. Contrary to the ALJ's finding, plaintiff's complaints of  
17 headaches are documented by medical sources, including Dr. Ahn (A.R.  
18 114), Dr. Larsen (A.R. 160, 169, 173, 385), and Dr. Hugh Gelabert (A.R.  
19 758). Accordingly, the Court finds that the ALJ's reason for not giving  
20 any weight to Dr. Gurvey's diagnosis was not legitimate.

21  
22 Moreover, to the extent that the ALJ cites Dr. Gurvey's "testimony"  
23 as a reason to dismiss plaintiff's headaches and any resulting work  
24 restrictions, the ALJ errs. After carefully examining Dr. Gurvey's  
25 testimony from the October 2008 hearing, the Court cannot find any  
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27  
28 <sup>10</sup> See, e.g., A.R. 273, 277, 281, 285, 289, 294, 300, 306, 311,  
315, 322, 325, 331, 333, 405, 407, 409, 411.

1 testimony from Dr. Gurvey regarding plaintiff's headaches.<sup>11</sup>

2  
3 Accordingly, the Court finds that the ALJ should revisit his  
4 consideration of Dr. Payne's diagnosis, and should he elect to give no  
5 weight to Dr. Payne's opinion, he should set forth legitimate reasons  
6 for so doing that are not based on a mischaracterization of the evidence  
7 of record. Further, the ALJ should develop the record further to  
8 determine whether plaintiff's headaches warrant a work restriction, and  
9 if they do, the ALJ should adjust his RFC determination accordingly.

10  
11 **III. The ALJ Improperly Evaluated Plaintiff's Credibility.**

12  
13 Once a disability claimant produces objective evidence of an  
14 underlying impairment that is reasonably likely to be the source of her  
15 subjective symptom(s), all subjective testimony as to the severity of  
16 the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885  
17 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.  
18 1991)(*en banc*); see also 20 C.F.R. § 404.1529(a) (explaining how pain  
19 and other symptoms are evaluated). "[U]nless an ALJ makes a finding of  
20 malingering based on affirmative evidence thereof, he or she may only  
21 find an applicant not credible by making specific findings as to  
22 credibility and stating clear and convincing reasons for each."  
23 Robbins, 466 F.3d at 883. The factors to be considered in weighing a

24  
25 <sup>11</sup> The ALJ also stated that "given [plaintiff's] daily  
26 activities, including driving, and her medication regimen," plaintiff's  
27 headaches do not warrant a work restriction. (A.R. 502.) As discussed  
28 *infra*, the Court fails to see how plaintiff's limited daily activities,  
including driving and complying with her medication regimen, would, as  
the ALJ suggests, negate plaintiff's headaches and/or possible need for  
a headache-related work restriction.



1 claimant's credibility include: (1) the claimant's reputation for  
2 truthfulness; (2) inconsistencies either in the claimant's testimony or  
3 between the claimant's testimony and her conduct; (3) the claimant's  
4 daily activities; (4) the claimant's work record; and (5) testimony from  
5 physicians and third parties concerning the nature, severity, and effect  
6 of the symptoms of which the claimant complains. See Thomas v.  
7 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R. §  
8 404.1529(c).

9  
10 An ALJ may not rely on a plaintiff's daily activities to support an  
11 adverse credibility determination when those activities do not affect  
12 the claimant's ability to perform appropriate work activities on an  
13 ongoing and daily basis. Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th  
14 Cir. 1990). As the Ninth Circuit noted in Lester, the ALJ must evaluate  
15 claimant's "'ability to work on a sustained basis.'" 81 F.3d at 833  
16 (emphasis in original)(citing 20 C.F.R. § 404.1512(a)). A claimant need  
17 not be "utterly incapacitated to be eligible for benefits . . . and many  
18 home activities are not easily transferable to what may be the more  
19 grueling environment of the workplace, where it might be impossible to  
20 periodically rest or take medication." Fair v. Bowen, 885 F.2d 597, 602  
21 (9th Cir. 1989).

22  
23 The ALJ generally stated three grounds for rejecting plaintiff's  
24 credibility: (1) plaintiff's daily activities and "active lifestyle"  
25 appear to be inconsistent with her alleged limitations; (2) plaintiff's  
26 use of her pain medications does not correspond with the level of pain  
27 asserted; and (3) plaintiff's symptoms do not correlate with objective,  
28 medical findings. (A.R. 498.) These reasons, while specific, are not

1 legitimate and do not constitute clear and convincing reasons based on  
2 substantial evidence as required.

3  
4 The ALJ's first ground is not legitimate, because plaintiff's daily  
5 activities are not, contrary to the ALJ's finding, inconsistent with her  
6 reported limitations. To support his adverse credibility finding on  
7 this ground, the ALJ asserts, for example, that "it appears that driving  
8 would be precluded if [plaintiff]'s use of her extremities were as  
9 limited as she suggests - and if her medications had such adverse  
10 affect." (A.R. 498.) He further states that plaintiff's "historically  
11 rather active lifestyle since the alleged onset date also tends to  
12 minimize her claims as to the frequency, intensity and duration of  
13 headaches or effects of medication." (*Id.*)

14  
15 At the October 2008 hearing, plaintiff testified that she drives  
16 her daughter two blocks to the bus stop every day and drives two blocks  
17 to her physical therapy session once a week. (A.R. 809-10.)  
18 Additionally, plaintiff testified to the following limitations: she can  
19 sit, stand, and walk for 30 minute increments each; she has a lifting  
20 capacity of less than 10 pounds; and she has problems using her hands --  
21 such that she cannot keyboard for more than 10-15 minutes and cannot  
22 open a water bottle without a hand grip. (A.R. 497, 815-16.) Plaintiff  
23 noted that she has pain in her neck, shoulders, and lower back, and  
24 while medications provide temporary relief, they make her drowsy and  
25 lightheaded. (A.R. 811-13.)

26  
27 Contrary to the ALJ's finding, the Court does not find the side  
28 effects of plaintiff's medications and her self-reported limitations to

1 be inconsistent with the scant amount of time she spends driving.<sup>12</sup> See  
2 Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) (noting "that  
3 the mere fact that a plaintiff has carried on certain daily activities,  
4 such as grocery shopping, driving a car, or limited walking for  
5 exercise, does not in any way detract from [plaintiff's] credibility as  
6 to her overall disability").

7  
8 Further, the Court does not find that plaintiff leads a  
9 particularly "active lifestyle." Beyond her limited, regular driving,  
10 plaintiff: performs light chores around the house, consisting of  
11 dusting, wiping, and washing laundry; goes grocery shopping once or  
12 twice a week; and cooks three to four times a month. (A.R. 810-11.)  
13 Plaintiff's limited daily activities -- which the ALJ noted that  
14 plaintiff performs slowly and with frequent rests (A.R. 498) -- do not  
15 appear to be inconsistent with her alleged medication side effects of  
16 drowsiness and lightheadedness, particularly in view of the fact that  
17 plaintiff only takes the stronger medications, Vicodin and Flexeril, two  
18 to three times a week (A.R. 832). Likewise, plaintiff's daily  
19 activities do not appear to be at odds with her self-reported daily  
20 headaches, which last for one to two hours a day. (A.R. 812.)  
21 Critically, the ALJ fails to explain how plaintiff's basic activities  
22 and light household chores translate into the ability to perform full-

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23  
24  
25  
26 <sup>12</sup> Plaintiff noted in a July 2003 Pain Questionnaire that when  
27 she must travel by car for prolonged periods, she "asks [a] family  
28 member to drive [her]." (A.R. 80.) When plaintiff does drive, she  
reported in a July 2003 Exertional Daily Activities Questionnaire that  
she "wear[s] a hand support and place[s] pillows under [her] hands for  
support." (A.R. 89.)

1 time work.<sup>13</sup> See Fair, 885 F.3d 602. This constitutes error.

2  
3 The ALJ further attempts to reject plaintiff's credibility by  
4 asserting that, "[if plaintiff] had the level of pain asserted, it would  
5 seem that she would take [her pain medications] more." (A.R. 498.) The  
6 ALJ's argument fails for several reasons. First, although not mentioned  
7 in the ALJ's decision, plaintiff testified at the October 2008 hearing  
8 that she takes the pain medication Neurontin daily. (A.R. 832.)  
9 Second, while plaintiff did testify that she takes Vicodin and Flexeril  
10 only two to three times a week, there is no evidence of record to  
11 support the ALJ's implication that she limits her use, because she is  
12 not in pain. (*Id.*) Rather, the evidence of record suggests that  
13 plaintiff limits her use of these strong and addictive medications,  
14 because they make her feel lightheaded and drowsy. (A.R. 812.) Third,  
15 plaintiff testified that the pain she experiences is often related to  
16 her daily activities. (A.R. 558.) Plaintiff noted, for example, that  
17 if she sits for too long, she will experience heavy pressure on her neck  
18 and shoulders, her muscles will begin to pinch, and this will cause her  
19 to have a headache. (*Id.*) Thus, it follows that to the degree  
20

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21 <sup>13</sup> Defendant's reliance on Morgan v. Apfel, 169 F.3d 595, 600  
22 (9th Cir. 1999), to support his contention that plaintiff's activities  
23 are inconsistent with her reported pain is misplaced. In Morgan, the  
24 Court found that plaintiff's "ability to fix meals, do laundry, work in  
25 the yard, and occasionally care for his friend's child served as  
26 evidence of Morgan's ability to work." Morgan, 169 F.3d at 600. The  
27 Morgan Court noted that "[i]f a claimant is able to spend a substantial  
28 part of his day engaged in pursuits involving the performance of  
physical functions that are transferable to a work setting, a specific  
finding as to this fact may be sufficient to discredit a claimant's  
allegations." *Id.* Here, unlike in Morgan, the evidence does not show  
that plaintiff spends a "substantial" portion of her day engaged in  
activities transferable to the work environment. Rather, the evidence  
shows that plaintiff performs basic activities slowly and with frequent  
rests. Accordingly, the Court finds the present case distinguishable  
from Morgan.

1 plaintiff can adjust her position throughout the day -- a limitation  
2 which the ALJ does not provide for in his RFC determination -- she can  
3 avoid situations that would trigger her need for pain medications.  
4 Accordingly, the Court rejects the ALJ's second ground for discrediting  
5 plaintiff's credibility because it is neither clear nor convincing.

6  
7 Lastly, the ALJ attempts to discredit plaintiff by asserting that  
8 plaintiff "testified to medical problems that have no foundation and for  
9 which she has not been treated, particularly low back pain." (A.R.  
10 498.) As discussed *supra*, the updated MRI and CT results, which appear  
11 to show that plaintiff's cervical spine condition has worsened since  
12 2002, were not considered. This additional evidence constitutes  
13 objective medical findings that could support plaintiff's reported  
14 symptoms, particularly her back pain.<sup>14</sup>

15 ///

16 ///

17 ///

18 ///

19  
20 <sup>14</sup> The ALJ also needs to consider the post-hearing evidence to  
21 determine what impact, if any, it has on his evaluation of plaintiff's  
22 allegations of pain. The ALJ attempts to discredit plaintiff's reports  
23 of pain by noting that she has benefitted from medications, chiropractic  
24 treatments, and physical therapy. (A.R. 498.) While there is evidence  
25 that plaintiff has benefitted from medications, chiropractic treatments,  
26 and physical therapy, this is not a complete picture of the evidence of  
27 record. There are several reports in the records noting that the above  
28 treatments were not effective. (See e.g., A.R. 114 (June 2002 Report --  
plaintiff "has tried physical therapy, acupuncture and chiropractic  
therapy; all of which have failed to relieve her symptoms"); A.R. 160  
(January 2004 Report -- injection ineffective).) Further, the evidence  
of record shows that plaintiff has remained symptomatic, as best  
evidenced by her thoracic outlet surgeries in 2006 and 2007, and her  
anterior cervical microdiscectomy with fusion and instrumentation surgery  
in 2008. Accordingly, the ALJ needs to review the entire record,  
including the new evidence, and revisit his evaluation of plaintiff's  
credibility with respect to her reports of pain.

1 **IV. The ALJ Must Review And Reconsider Plaintiff's RFC And Plaintiff's**  
2 **Ability to Perform "Other Work."**

3  
4 Based on the foregoing, there are several matters that the ALJ  
5 needs to review and reconsider on remand. As a result, the ALJ's  
6 conclusion regarding plaintiff's RFC and her capacity to perform "other  
7 work" may change. Therefore, the Court does not reach plaintiff's third  
8 and fourth claims, *to wit*, that the ALJ erred in determining plaintiff's  
9 RFC, and the ALJ erred in finding plaintiff can perform work other than  
10 her past relevant work. To properly review and reconsider these issues,  
11 the ALJ needs to consider the additional evidence and determine what  
12 weight, if any, the evidence has on his evaluations with respect to the  
13 opinion of plaintiff's treating doctor, the diagnosis of plaintiff's  
14 chiropractor, and plaintiff's credibility. Further, to the extent that  
15 plaintiff's RFC is reassessed, additional testimony from a vocational  
16 expert likely will be required to determine whether plaintiff can  
17 perform work other her past relevant work.

18  
19 **V. Remand Is Required.**

20  
21 The decision whether to remand for further proceedings or order an  
22 immediate award of benefits is within the district court's discretion.  
23 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
24 useful purpose would be served by further administrative proceedings, or  
25 where the record has been fully developed, it is appropriate to exercise  
26 this discretion to direct an immediate award of benefits. *Id.* at 1179  
27 ("[T]he decision of whether to remand for further proceedings turns upon  
28 the likely utility of such proceedings."). However, where there are

1 outstanding issues that must be resolved before a determination of  
2 disability can be made, and it is not clear from the record that the ALJ  
3 would be required to find the claimant disabled if all the evidence were  
4 properly evaluated, remand is appropriate. *Id.* at 1179-81.

5  
6 Here, remand is the appropriate remedy to allow the ALJ the  
7 opportunity to remedy the above-mentioned deficiencies and errors. See,  
8 e.g., Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for  
9 further proceedings is appropriate if enhancement of the record would be  
10 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)  
11 (remand appropriate to remedy defects in the record).<sup>15</sup>

12  
13 On remand, the ALJ must correct the above-mentioned deficiencies  
14 and errors. Specifically, the ALJ needs to: (1) revisit his finding  
15 that plaintiff's cervical spine impairment was not "severe"; and (2) in  
16 view of the new evidence, review and reconsider his evaluation of both  
17 the opinion of Dr. Larsen and plaintiff's credibility. In addition, the  
18 ALJ should revisit his evaluation of Dr. Payne's diagnosis, and  
19 recontact Dr. Larsen to address any question he might have regarding Dr.  
20 Larsen's findings and/or any perceived inconsistencies between Dr.

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21  
22 <sup>15</sup> This case was remanded twice, once by this Court in 2007,  
23 because ALJ Reason improperly rejected the opinion of plaintiff's  
24 treating physician and improperly discredited plaintiff's credibility,  
25 and once by the Appeals Council in 2008, because ALJ Reason improperly  
found that plaintiff could return to her past relevant work as a  
hostess. Thus, this is the **third** time that this case is being remanded.

26 In remanding this case, the Court is mindful of the Ninth  
27 Circuit's astute comments in Benecke that multiple remands may unfairly  
28 "delay much needed income for claimants who are unable to work and are  
entitled to benefits." 379 F.3d at 595. Accordingly, the Court directs  
that this matter be dealt with in an expeditious manner to avoid  
unnecessary delay and further potential prejudice to plaintiff.

1 Larsen's 2003 and 2004 reports. After correcting the above errors and  
2 deficiencies, the ALJ needs to reassess plaintiff's RFC. Further,  
3 additional testimony from a vocational expert likely will be needed to  
4 determine what work, if any, plaintiff can perform.

5  
6 Lastly, in view of the additional evidence, the ALJ should have a  
7 consulting physician examine plaintiff and look at the new records to  
8 see if there is any support for plaintiff's alleged limitations.

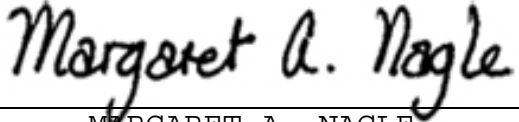
9  
10 **CONCLUSION**

11  
12 Accordingly, for the reasons stated above, IT IS ORDERED that the  
13 decision of the Commissioner is REVERSED, and this case is REMANDED for  
14 further proceedings consistent with this Memorandum Opinion and Order.

15  
16 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
17 copies of this Memorandum Opinion and Order and the Judgment on counsel  
18 for plaintiff and for defendant.

19  
20 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

21  
22 DATED: November 3, 2010

23  
24   
25 MARGARET A. NAGLE  
26 UNITED STATES MAGISTRATE JUDGE  
27  
28